

**Responses of David B. Rivkin, Jr., to
Questions for the Record from Senator Charles E. Grassley**

Question No. 1: Mr. Rivkin, as you know, the Administration contends that unless the United States reciprocates compliance with the ICJ ruling, Americans are in danger of losing their consular access rights abroad. It also says that various other forms of foreign cooperation with the United States are threatened.

Can you elaborate on the empirical evidence that the United States or its citizens have been caused any harm by virtue of our 7 years of non-compliance with the ICJ decision?

What basis is there to believe that any of the nightmare scenarios that the Administration and others fear will come to pass?

I am aware of no empirical evidence that suggests that the United States or its citizens have been caused any harm by virtue of the post-*Avena* U.S. behavior. Even more importantly, the State Department, which is in the best position to assess this matter, has proffered no evidence of any *Avena*-related harm inflicted on the United States or its citizens. In this regard, while it has proffered some information about certain States'¹ failure to fully comply with the 1963 Vienna Convention, this non-compliant behavior has not been linked in any way to *Avena*-related issues.

Indeed, in most instances, non-compliance with the Vienna Convention has been anchored in a broader pattern of violations of domestic and international legal obligations by certain States, exacerbated at times by their tense, ambiguous, or even outright confrontational relations with the United States. For example, Ms. Gillis's treatment by the Libyan authorities falls into such a category. Obviously, non-compliance of this nature cannot and will not be cured by the enactment of the S. 1194 or, for that matter, by the passage of any other U.S. domestic statute.

Overall, I do not believe that there is any credible basis to state that the nightmare scenarios that the Administration and other supporters of S. 1194 speculate may occur due to the failure to enact S. 1194 will come to pass. At the same time, I am troubled by their speculations. Having senior U.S. government officials plead, in dramatic tones, that other countries *should* be so concerned about our post-*Avena* record as to stop complying with the 1963 Vienna Convention may well prompt one or more countries to do so.

In this regard, it is also unfortunate that the S. 1194 proponents are reluctant to acknowledge that, despite the inability of the United States to implement fully the *Avena* decision, our overall compliance with the 1963 Vienna Convention is second to none. Two points are worth emphasizing. First, I am aware of no instance where any person who has explicitly requested consular access pursuant to the provisions of Article 36 ever had this request unmet. Yet it is to deal precisely with these types of the requests that Article 36 was drafted. Second, the U.S., in its written submissions and oral arguments before the ICJ, has consistently asserted that the United States' overall record of Vienna Convention compliance was superb and, in fact, superior to that of many other signatory parties. I find it troubling that the current Administration has not seen fit to rearticulate these points, even while pressing for the passage of S. 1194.

¹ In this response, I use "States" to mean foreign states, and not the U.S. states.

Question No. 2: Mr. Rivkin, the Administration witnesses described the bill before us as "narrowly tailored," "carefully crafted," and "very limited." Would you agree with that characterization? Can you give examples of the bill's far-reaching effects?

I would not describe S. 1194 as "narrowly tailored", "carefully crafted," or "very limited." My prepared statement provides numerous examples of how this legislation imposes mandatory requirements on state government officials, literally conscripting them to carry out the duties arising out of Article 36. Aside from these "going forward"-related obligations, S. 1194 upends the entire framework of federal habeas review of state legal proceedings, eviscerates well-established judicial doctrines, and may well allow some individuals—who have been found guilty of the most heinous offenses through the world's best, most due process-laden proceedings—to go free or have their well-deserved sentences substantially altered. The fact that a relatively small number of individuals may be affected by these provisions does not make them any more palatable.

In my view, however, what is most objectionable about S. 1194 are not these practical concerns, but the abrogation of our system of federalism. The *degree* of the burden imposed on state officials is irrelevant. Recall that the burdens imposed on state legislative and executive branch officials at issue in *New York v. United States* and *Printz v. United States* were quite limited. And yet, the statutes at issue in those cases were struck down by the Supreme Court. What mattered the most was not the extent of actual burdens imposed on state officials, but rather the fact that those burdens violated state sovereignty by conscripting and commandeering state officials. This is the same problem that is clearly present in S. 1194. I am confident that if S. 1194 were ever enacted, it would also be struck down by the Supreme Court.